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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Communications Assistance for
Law Enforcement Act

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CC Docket No. 97-213

GTE's COMMENTS

Dated: May 20, 1998

GTE Service Corporation and its affiliated
domestic telephone operating companies

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SUMMARY

GTE urges the Commission: (1) to recognize that the interim standard J-STD-025 defines "*Safe Harbor*" in statutory terms; and (2) to determine based on the existing extensive and well-developed record that the nine "*Punch List*" items do not come within the CALEA requirement. In the event that the Commission considers the record insufficient, a proceeding should be initiated with a limit of three months to resolve the question of what if any *Punch List* items should be included in *Safe Harbor*.

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GTE's COMMENTS

GTE Service Corporation and its affiliated telecommunications carriers¹ pursuant to the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. section 1001 *et seq.*,² and in response to the Commission's Notice DA 98-762 (released April 20, 1998) (the "Notice"), hereby offer Comments on petitions filed by the FBI³ (the "*FBI Petition*", seeking to add additional capabilities to the industry interim standard), the Center for Democracy and Technology ("CDT")⁴ (the "*CDT Petition*", seeking to

¹ GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., GTE Wireless Incorporated, and GTE Communications Corporation.

² All references to statutory sections or subsections are to 47 U.S.C. unless otherwise specified. See also section 229.

³ Joint Petition for Expedited Rulemaking by the Federal Bureau of Investigation and the Department of Justice (the "FBI"), in this CC Docket No. 97-213 ("D.97-213"), submitted March 27, 1998 (the "*FBI Petition*").

⁴ Petition for Rulemaking under Sections 107 and 109 of the Communications Assistance for Law Enforcement Act, the Center for Democracy and Technology ("CDT"), submitted March 26, 1998 (the "*CDT Petition*").

remove two capabilities from the industry interim standard), and the Telecommunications Industry Alliance ("TIA")⁵ (the "*TIA Petition*", seeking to have any changes in the industry interim standard remanded to its Subcommittee TR 45.2 for resolution).

The *FBI Petition* (at 4) contends that the interim standard J-STD-025 developed by TIA Subcommittee TR 45.2 "lacks specified electronic surveillance assistance capabilities and related provisions that are required by CALEA." In other words, the FBI insists on including within CALEA requirements capabilities not found in the J-STD-025 interim standard that are commonly referred to as the "*Punch List*." The FBI argues that the *Punch List* items must be provided under CALEA in addition to the J-STD-025 items, while the industry generally denies that the *Punch List* items are included in the CALEA requirement.

DISCUSSION

I. GTE URGES THE COMMISSION TO RECOGNIZE THE INTERIM STANDARD J-STD-025 AS REPRESENTING "SAFE HARBOR" UNDER SUBSECTION 1006(a); AND TO MOVE QUICKLY TO RESOLVE THE *PUNCH LIST* CONTROVERSY.

GTE suggests that the first step for the Commission should be to identify the J-STD-025 standard as defining the "accepted standards" or "*Safe Harbor*" pursuant to

⁵ Petition for Rulemaking, Telecommunications Industry Alliance ("TIA"), submitted April 2, 1998 (the "*TIA Petition*").

subsection 1006(a)(2).⁶ The industry has adopted the J-STD-025 standard, and the FBI explicitly recognizes that the J-STD-025 standard is "the industry's safe harbor" and as such remains in place until "superseded by the Commission's final rule."⁷ GTE believes that the record is sufficient to permit the Commission to immediately declare the J-STD-025 standard *Safe Harbor* for purposes of CALEA implementation.

This does not preclude action in the future bringing additional appropriate items within *Safe Harbor*. It is GTE's view that the *Punch List* items do not come within CALEA. This view is substantiated by careful industry analyses prepared in the course of more than three years of negotiation.⁸ GTE urges the FCC to conclude that the *Punch List* items are not required by CALEA and should not be included in *Safe Harbor*.

In the event that the Commission finds this record insufficient to establish this conclusion, GTE urges the Commission to move quickly to initiate a proceeding with a

⁶ Subsection 1006(a)(2) says: "A telecommunications carrier shall be found to be in compliance with the assistance capability requirements under section 103, and a manufacturer of telecommunications transmission or switching equipment or a provider of telecommunications support services shall be found to be in compliance with section 106, if the carrier, manufacturer, or support service provider is in compliance with publicly available technical requirements or standards adopted by an industry association or standard-setting organization, or by the Commission under subsection (b), to meet the requirements of section 103." *Emphasis added.*

⁷ Comments Regarding the Commission's Authority to Extend the October 25, 1998 Compliance Date, by the FBI and the Department of Justice, submitted March 27, 1998, at 6: "J-STD-025 currently serves as a safe harbor for carriers.... If the safe harbor standards designed by the industry are deficient, the Attorney General can ask the Commission to set a superseding safe harbor [section 107(b)], which she has done, but the industry's safe harbor remains in place until it is superseded by the Commission's final rule."

⁸ See for example Comments of United States Telephone Ass'n filed concurrently herewith. USTA maintains that none of the nine *Punch List* items come within the scope of section 103. As to five of the nine items, USTA specifically points out that they are not "reasonably achievable." This includes: Party Hold, Party Join and Party Drop Messages; Subject-Initiated Dialing and Signaling; Notification Messages for In-Band and Out-of-Band Signaling; Feature Status Message; and Dialed Digit Extraction.

specified time limit to examine the *Punch List* and determine whether any of the *Punch List* items are appropriate for inclusion in *Safe Harbor*. Since the matter has already been argued exhaustively, there should be no difficulty in the FCC's hearing all sides and issuing a decision within three months.⁹ A Commission decision on the *Punch List* within this period would allow final resolution including the likely appeal cycle within twelve months.

There is nothing impossible or even extremely difficult in this scenario. It requires a firm hand in keeping all parties on schedule – something the Commission knows how to do. And it will place implementation of CALEA on a realistic and rational basis.

Regardless of the FBI's argumentation, at the very least it must be considered doubtful that any court would hold responsible thousands of firms for failure to meet a set of governmental requirements never identified as such by the government till long after the fact. This point is not only a matter of due process — which here is another word for elemental fairness and practicality. It also implicates the Just Compensation Clause of the Fifth Amendment¹⁰ — which the Supreme Court of the United States has treated with increased respect over the last dozen years and which Congress recognized in CALEA , specifically in section 1006(a), the *Safe Harbor* provision.

⁹ Note that TIA (at 4) recommends a proceeding with a 30-day comment cycle and a 30-day reply comment cycle. GTE believes an accelerated cycle is practical and justified. Items determined to be reasonably achievable and within the scope of section 103 should be remanded to the TIA Subcommittee TR 45.2 for standards development.

¹⁰ "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amendment 5.

The FBI's arguments would make the *Safe Harbor* provision essentially meaningless. It is axiomatic that legislation should be read whenever possible to give meaning to all elements.¹¹ Moreover, even if Congress had left *Safe Harbor* out of CALEA, the Courts would recognize the constitutional principle that prohibits confiscation. It is entirely practical for the Commission to give full recognition to the intent of Congress and the substance of the Constitution through the program of action recommended *supra* by GTE, which starts with the extension of the CALEA-compliance deadline as discussed *infra*.

If the Commission does not take this prompt and decisive action, the objectives of Congress will not be realized. The one thing everyone could then be confident of is that there would be a massive court case – or even a series of massive interrelated court cases as the FBI brings cases against the nation's carriers and manufacturers under the FBI's reasoning focused on individual firms. This endless litigation would involve the FBI and the rest of law enforcement, many thousands of carriers and telecommunications manufacturers, plus trade associations and consumerists and rights activists and so forth, and so forth. The only beneficiaries would be the nation's lawyer-litigators, who would celebrate a great and glorious payday. This is not what Congress and the Administration and the people of the United States expect the FCC to do.

¹¹ "See *Mountain States Tel & Tel.Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985), speaking of the canon of construction that a statute should be interpreted so as not to render one part inoperable."

GTE believes that the J-STD-025 interim industry standard adopted as "accepted standards" under subsection 1006(a) represents a powerful industry consensus of the concerned parties, and among the carriers most involved (at least) it may prove to be virtually universal. Identification of items that come within this standard satisfies what was envisioned by Congress when it directed the industry and law enforcement to use the consultative process described in subsection 1006(a). With the FBI's acceptance of this standard as comprising *Safe Harbor* -- subject to the addition of such other appropriate items as the FCC concludes to be within the scope of CALEA -- J-STD-025 reflects what Congress expected: essential agreement of industry and government.

This action by the Commission will give a clear and trustworthy signal not only to carriers but to manufacturers as well. Such a signal will allow equipment manufacturers to begin securing resources to start construction of the hardware and software necessary to implement the standard.

II. THE RECORD ESTABLISHES OVERWHELMINGLY THAT EVEN JUST IMPLEMENTING J-STD-025 IS NOT REASONABLY ACHIEVABLE BY OCTOBER 25, 1998.

As stated *supra*, GTE believes that the record shows, and the Commission should immediately declare, that the J-STD-025 standard qualifies as *Safe Harbor* as contemplated by subsection 1006(a). This is a conclusion with which the FBI does not disagree.¹²

However, declaring J-STD-025 *Safe Harbor* does not mean it is reasonably achievable by October 25, 1998. The record in this proceeding is without contradiction

¹² See n.7 *supra*.

that no manufacturer is building equipment (either hardware or software) to meet the J-STD-025 standard, or any other standard for that matter. Thus, even if there were universal agreement on J-STD-025, the specific technical requirements comprising J-STD-025 will not be available to carriers for use in meeting section 103 obligations in the immediate future.

GTE urges the Commission to recognize that substantial developmental work remains even to create technical solutions to meet the J-STD-025 standard. The new capabilities that must be built into the nation's switching systems under J-STD-025 will be unique in history and considerable effort will be required to fully test the enhancements to ensure that network reliability is not compromised.

Carriers have learned that a very great risk to network reliability occurs when major software upgrades are implemented. Even though the industry has developed highly reliable hardware and software conversion techniques, no carrier relishes the opportunity to perform "open heart surgery" on a working switching system. For these reasons, GTE urges the Commission to reach a decision on the disputed items as soon as possible. Even at this late date, equipment manufacturers could benefit from greater certainty. The design activities that will be required to build the J-STD-025 capabilities would be greatly enhanced if equipment manufacturers are knowledgeable about the CALEA requirement as a totality. In other words, designers will be able to implement CALEA more economically if they can evaluate CALEA requirements as an entire package. And it is certain that, the longer a final FCC decision is delayed, the more likely it will be that substantial unnecessary costs will be incurred. A dual development

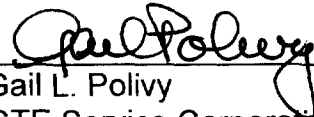
process is likely to drive the total cost of CALEA higher because equipment vendors would not be able to optimize the design phase.

Dated: May 20, 1998

Respectfully submitted,

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "GTE's Comments" have been mailed by first class United States mail, postage prepaid, on May 20, 1998 to all parties of record on the attached list.

A handwritten signature in black ink, appearing to read "Ann D. Berkowitz", written over a horizontal line.

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